UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case 01-4319-CIV-KING

SYLVIA ALLEN
Plaintiff,
vs.
R.J REYNOLDS TOBACCO COMPANY,
and PHILIP MORRIS INCORPORATED
Defendants.

MIAMI, FLORIDA
FEBRUARY 7, 2003
FRIDAY - 9:00 A.M.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES LAWRENCE KING,
UNITED STATES DISTRICT JUDGE
VOLUME 1

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THE COURT: Please be seated.

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Mr. Reid.

MR. REID: Your Honor, when Doctor Cummings was tendered in four areas; smoking cessation, risk perception, youth marketing, and the final was CTR and TI and associated documents. When Doctor Cummings was on the stand, the morning part of his direct was focused on smoke cessation.

The Court, as you will recall, ruled only two of the four areas would be appropriate for expert testimony, that being smoking cessation, to which there was no objection, and CTR slash TI and associated documents. Risk perception and youth marketing were excluded from the witness at that time.

The morning was devoted essentially to smoking cessation.

The afternoon began with Mr. Yaffa -- actually, he made the board. I will direct the Court's attention to it, because I have saved it here, summarizing the two areas that Doctor Cummings would testify in; smoking cessation and TIRC, which became CTR and TI.

The first question in the afternoon was by Mr. Yaffa was; "Do you understand that the Court has acknowledged and recognized you as an expert in regard to the Tobacco Institute Research Committee?"

"Answer: Yes."

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So it was clear at the point that the witness was tendered in a particular area. The Court permitted a testimony in the particular area. In front of the jury, both in writing and orally, plaintiff's counsel reiterated this.

The Court never instructed the jury after the in limine motion was argued. We had taken a break and the jury came back. The Court never expressly instructed the jury that Doctor Cummings would not be permitted to testify in the other two areas that had been discussed at some length in the proffer.

Had Doctor Cummings stayed within the discussion of CTR, TI and TIRC documents, I wouldn't be making this motion. Instead, the plaintiff started going through -- Mr. Yaffa started going through all nature of documents with Doctor Cummings. Clearly, many -- and I'm sure this would even be stipulated to, many that had nothing to do with CTR or TI, "Meat the Turk," clearly, a youth marketing document, and on and on. We had our objections. We preserved them and the Court permitted a standing objection.

Now, the only answer that came up yesterday, and I will speak to that now in anticipation, was were these documents in evidence. The fact that a document is in evidence does not open the door to permit ever witness, especially an expert whose testimony has been circumscribed by the Judge, to testify about every document.

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For instance, if there is an orthopaedic expert on the stand, as there may be next week, certainly, he would not be able to talk about cigarette design, because there is a cigarette design document in evidence.

Likewise, Doctor Cummings, the public health doctor, qualified as an expert in smoking cessation and in a particular population of documents, should not be permitted to testify about the chemistry staining that is at issue that there are documents in evidence about.

This is especially the case with an expert witness, because the Court has determined the areas, the parameters in which this expert can testify. One area, clearly, was that Doctor Cummings could not testify as to youth marketing.

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The problem that we faced yesterday was that Mr. Yaffa, with his documents, and Doctor Cummings with his testimony, moved far beyond the Court's ruling. At one point the argument was made. The Court said something to the effect in response to the argument, said, "this man is an expert in all 36 billion pages because he has looked at them."

Respectfully, that can not be the law. This expert, as we argued in the beginning --

THE COURT: I don't really think that I said he was an expert in all 32 billion. I don't think that I said that. I said I think he has been qualified under the CTR and the associated documents with telling the jury what he found, but

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that doesn't mean that he is an expert on the documents. I don't think I ever indicated that to the jury.

I don't mean to interrupt you. I think we have really got to keep this as factually as what occurred.

MR. REID: The argument that was made by counsel was essentially that. The way the documents --

THE COURT: I can't control what counsel says anymore than I can control what you say. That's not what I said. That's not what I meant to imply. If, by any chance, that impression got conveyed to the jury, that can be corrected by an instruction from the Court to the jury upon appropriate motion, but you all have to ask for those instructions.

I am a self-starter whenever I catch something that I think is unfair, I try to tell the jury about it. But you all have to ask me to instruct the jury. If I have misstated something, I will be very happy to make it clear to the jury. If you believe that I truly said he was an expert and could say anything he wanted to say about 32 million documents, I will be glad to explain that he is not.

MR. REID: I am relying on what I thought I heard. I haven't seen the transcript. I know the argument was made. When you consider the documents beyond the CTR and associated documents, and principally in the area of youth marketing, there were great numbers. The Court will recall the surveys. The smoking ages. They were internal to the companies in some

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cases. They clearly related to the subject that had been excluded.

As I suggested in the beginning, the danger, and this goes to the prejudice to the defendants which we think warrants the mistrial, the danger is that a witness gets on the stand, and becomes an expert in truthsake, I did see this morning a quick transcript, and the Court did reiterate that you just can't put a witness up and ask him if the document is true or not.

In fact, that is virtually the only opinions this witness testified to. He did not read the documents verbatim. He paraphrased the documents. He would read snippets of parts that the lawyers had highlighted. He, in fact, while he wasn't reading, in an attempt to get around perhaps the Court's clear ruling that witnesses couldn't get up and just read, he paraphrased the documents.

He gave this evidence. He said, "that is a lie." He said "that is fraud." Later, using his technical term, he said "that's poppy-cock."

That, clearly, is for the jury to decide. That is what the witness did over and over with these documents, which made the prejudice of permitting him to go into all of these other areas beyond the CTR and TI even more harmful.

If, in fact, the document is not true, the jury will

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decide it was not true. He also would say, often times, that

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document says X. I know of another document that says Y.

If the jury has been led to believe that he is an expert on documents in general, and he says I know of another document, there are two ways that you do that. Either you put that other document in evidence and you let the jury look at the two documents and decide.

You don't bring an expert witness in and permit him to say "this document is a lie because I know about another document" and it's not offered. We don't even know if it's in evidence. We don't even know what he is thinking about. He did that over and over.

This is the relief that we seek. I will give you all the relief instead of coming back. Number one, we seek a mistrial. We think this is so overwhelmingly prejudicial. We did make objections exactly to this. I realize the Court prefers not to have side bars, and then we stopped and I made the mistrial and you said we would take it up later --

THE COURT: I prefer not to send the jury out every three minutes and bounce them back and forth. There are altogether about ten lawyers here and crowding around this bench trying to whisper things to me, is an unsatisfactory way of having an accurate record, and it's unsatisfactory way of conducting a trial in front of a jury.

I just don't want the jury to have to bounce in and out while we take these things up so I can hear you, and the

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reporter can hear you. It's to keep the jury from having to shuffle in and out.

Yes, you are asked to limit your objections to one and two words. You did that. You did exactly what I asked you to do. I did give you an opportunity. I am giving you an opportunity to take up, in any detail you wish, morning or night, as long as our staff can keep up with it, we will be here with you. I don't want to leave in the record that you have a weirdo down here that just does not let the lawyers talk to him. I do, it's just the way in which we do it.

MR. REID: We did object yesterday.

THE COURT: Yes, you did. That was preserved for you. You have a right to do that.

MR. REID: Remedy number one would be a mistrial. At a minimum, the Court never instructed the jury with regard to its rulings about experts.

Plaintiffs counsel listed these two, and those are fine. We had no problem with those. We think, at a minimum, today you need to tell the jury what Doctor Cummings was permitted to testify to as an expert and what he was not.

Specifically, we believe, and I respectfully request, that you tell them he was permitted to testify as to smoking cessation, and CTR, TI, TIRC documents, and that he was not an expert and not permitted to give any expert regarding risk perception or youth marketing, at a minimum, regardless of

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anything else, we believe that is appropriate.

Failing to grant a mistrial, we would request a curative instruction in that the Court, in front of the jury, strike all of the testimony of Doctor Cummings with an instruction -- to strike all of the testimony of Doctor Cummings with an instruction to the jury that they are to disregard it to the extent that testimony was about any documents not related to CTR or to the extent that testimony was related in any way to the subject matter of youth

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marketing.
We believe, short of a mistrial, while these alternative proposals, we don't believe cure the extreme prejudice and harm to this trial. If there is not a mistrial granted, we respectfully request that the Court give these instructions.
Thank you, Your Honor.
THE COURT: Mr. Coll, Mr. Reilly, anything further?
MR. REILLY: No, Your Honor.
THE COURT: Mr. Grossman.
MR. GROSSMAN: Let me state at the outset, Your Honor, I would prefer you grant a mistrial than compromise what this Court appropriately did simply because an argument is made that they want a curative instruction. I say that because what the Court did was entirely appropriate.
If we have a transcript of what the motion for

mistrial asked for, they should also. Let me read to you exactly where we were at that moment.
"A film, a videotape was being shown. A film, a videotape that was in evidence. It was called to your attention. It was then turned off. And I didn't even see what they say they saw. I saw channel 2. I think that's what you saw."
THE COURT: Excuse me. I did not look at it. My attention was called to it, and at that point Mr. Yaffa had already turned it off. So when I looked at it, it said "channel 2." I didn't see what was a matter of concern to Mr. Reid or to Mr. Coll, because I wasn't turned all the way around in the back of my chair looking at the T.V. screen.
MR. GROSSMAN: After you heard his objection, because you said that you have excluded the topic with this witness and the Court said "the topic" and Mr. Reid said "youth marketing."
"All right let me find out what is on the film coming up."
Mr. Yaffa said "this is 388C." "This is the tape where it reflects the position that the industries took in regard to youth marketing. It's the same position they took through TIRC and CTR, which he is an expert in. It is consistent with it. There's TIRC documents reflecting it."
The Court then said; "this document, which is in

evidence, referring to the film you can play to the jury."
"Now, what I need to know is what question, after this film is played to the jury, what you are going to ask this witness, which Mr. Reid apparently has an objection to. I want to know what it is you are going to ask this question."
Mr. Yaffa: "One question. It will be Judge, is what you saw on the tape consistent with the industry position as expressed with the TIRC, CTR and TI?"
Then the Court asked; "Mr. Reid, do you have an objection to that?"
He said "Yes, I do."
You said "Overruled."
Mr. Reid said, "Your Honor, it may have been lost. I did move for a mistrial as a result of this."
And you said "When did you move for a mistrial?"
That was the issue that surrounded this.
Okay, now. Let's go back if you can to the issue of youth marketing and how this whole matter arose.
Some time after Andy Yaffa had questioned Doctor

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Cummings on his qualifications, you asked Mr. Reid if he chose to voir dire. Mr. Reid's questions, in large part, dealt with marketing issues, not insofar as what TIRC marketed. This is a very, very important issue. Not in so far as what TIRC said, because these documents are already in evidence.

What Mr. Reid did was he kept asking him questions, "did you take marketing in college? Have you ever marketed a product? Do you have a masters degree in marketing? Have you worked for a marketing company or public relations company or sales company?"

Interestingly enough, Doctor Cummings has a product which you know about. It's the product in which he has now seen over 10,000 patients that have a desire to stop smoking, the smoking cessation issue. He publishes pamphlets extra.

If you were a marketing expert -- had the plaintiffs were to call a marketing expert, and they would raise their right hand and say I am with Slocum and Adams, and we're with the number three marketing company in America, here is the way this marketing was, this is what it's intended use was, things of this nature, then he would become a marketing expert. He was not. He was a TIRC expert. Now I am going to show you precisely what we mean. Then I'm going to come back and comment on his issue about the cross-examination.

Let me do it right now, Judge. You will recall that Mr. Reid spent a little time this morning saying if document X is this, and he would say "there's a document y that counters that, which is in evidence," he is the person that showed him document X. That all came about in cross-examination. It wasn't brought out on Mr. Yaffa's direct. That's in this record. He is the person who asked him "what about this

document?"

This is a letter that you have seen. You recall it was United States Senator who became active with the tobacco group. There was the Honorable Paul Rogers, who was a very famous congressman whom I remember. He was the Chairman of the subcommittee on health in the environment. A letter was written to him by Horace Kornegay. This letter is in evidence. It's worthwhile reminding you of what it shows especially in view of the videotape that we showed into evidence. This is the "poppy-cock" expression.

"Dear, Mr. Chairman, certain inquiries were made by the subcommittee during my testimony on February 15. See transcript 117, page 123 through page 1191.9. I am writing to confirm that I am unaware of any consumer study conducted by any of our member companies with regard to children, nor of any cigarette advertising campaigns directed at children whether male or female."

Do you have that now?

MR. YAFFA: Let me put it up, please.

MR. GROSSMAN: This was the head of the tobacco institute, TIRC, writing a letter to Chairman Rogers and lied again by saying; "I am writing to confirm. I am unaware of any consumer study conducted by any of our member companies which regarded children, nor any cigarette advertising campaigns directed at children, whether male or female."

Now lets think about this.

Doctor Cummings, who testified he was the repository of all the original documents that TIRC and others had submitted that people from around the country had sent to him certain documents. He had boxes of them, boat loads of them,

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was able to then, by showing this film and other exhibits, say that this, in fact, is not true. This is a TIRC letter. And then using a TIRC exhibit, he is able to show where the truth lies.

That has nothing to do with being an expert in marketing. It has everything to do with being knowledgeable about the issue which was before the jury, which was what was the TIRC position. This gentlemen, this learned gentlemen, who was found to be an expert in TIRC, and it's related organizations, showed us the truth and helped the finder of fact come through.

Now, much of has been made about the plain language of documents. Look at this document. It is as plain a language as can be. If one looked at Mr. Horace Kornegay's statement to the Honorable Paul G. Rogers, you would think that the plain language of this document speaking for itself was that the industry just never advertised to children.

So it took a TIRC expert, not as a marketing expert but as someone who knew the ropes, someone who knew the evidence, to come before the Court and take us on a tour of the

documents, which is what he did.

That's why when I first stood up said "I would rather have a mistrial than have his testimony undermined." I believe the Court understands.

Now, that's the motion that was made. That's when it was made. It was before and after the tape. Of course, we all know that the tape showed what the TIRC position was, because we had to ask the question or give it to the Court before it was even asked, which is that this tape show the TIRC position.

It's unfortunate, Judge, and I say that for the defense, that the Tobacco Institute, on it's own films and documents, and in its own testimony, clearly showed it marketed to children. We are allowed to show that, and we used Doctor Cummings as the expert to be the vehicle to present the truth.

Please do not instruct the jury in this other way, because they will think that he didn't know anything about the documents and what he was qualified to do. That would be a very serious undermining of this gentleman's testimony.

They had a full cross-examination. We stayed until 6:30 at night. Any points that they wanted to make about his not being in marketing were made. Certainly, in the voir dire and later throughout his cross-examination.

Thank you very much.

MR. REID: Your Honor --

THE COURT: Take your time, Mr. Reid. We've got

plenty of time.

MR. REID: Don't want to keep the jury waiting.

THE COURT: That's all right. I want you to have all the time you need. If they have to wait, they can wait.

This is going into the area of admissibility of evidence regarding youth marketing, which, up to this point, has seemed to be somewhat remote and relative to the issues in the case. As I read more and more of these depositions, I am understanding the importance of it. It is important. Take your time.

MR. REID: That reminds me, Your Honor. We initially objected to the whole issue of youth marketing on the basis of relevance because there will be no evidence in this case that Mr. Allen saw or relied or took any action as a result of any marketing while he was a youth. We objected to the documents and to the testimony.

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Now, we are talking about whether or not this expert exceeded the areas in which he was limited by the Court. Let me speak to the points that Mr. Grossman makes.

Mr. Grossman attempts to minimize the grounds for the motion because of relating it to the tape. It was not entirely related just to that evidence. It was related to the continuation throughout the whole day of documents being with youth marketing that were not part of TIRC's collection; number one.

Even in limiting it, Mr. Grossman never mentioned to you this morning that the first thing that caused me to jump up. It was in two-foot high letters on the screen. I had it measured on the screen. It said; "youth marketing," that's why I jumped up. The jury saw that. It was up.

THE COURT: That's all right. I believe you. I was just making some notes. I didn't mean to imply it wasn't there. I did not see it.

Also, for all of your information, when I turn all the way around and I look at this thing to my extreme right, my back is to the jury. I am trying to do it by turning my head. As a consequence of five days and forty-five hours a day, I am getting a big crick in my neck. Forgive me if I don't look over at that. I assume that it is up on that huge screen that you all can see. You are monitoring it, and you are watching it, and you saw what appeared to be to you a proper objection.

I don't want to leave in the record that it wasn't there. I, certainly, accept your word that it was there.

MR. REID: I wasn't suggesting that you should have seen it, because I understand the technical problems that we have. I just wanted to make it clear that from Mr. Grossman's argument wasn't mentioned, and that all he saw was "number two" up there.

He conceded the point that I'm making. He conceded that Doctor Cummings was limited to documents relating to the

tobacco, TIRC and CTR and TI and so forth. That's point number one. That was the limitation. Now, the document he puts up here isn't one of the defending documents. It's a Tobacco Institute document. We objected, and we had other arguments. For the purpose of this motion, that's not the kind of document I am talking about.

I am talking about a document that is perhaps a totally internal company document that had nothing to do with the Tobacco Institute or the counsel for Tobacco Research. Those were the offending documents.

There was one dealing with Meat the Turk, T-u-r-k, Campaign that was directed to young adults. That's an example.

We're in agreement that even limited to certain documents, the document on the screen is an exact example of something that describes the limitations.

Here is the problem. Mr. Grossman also admitted another point that I made when he said; we just asked Doctor Cummings if this document was consistent with company positions based on your looking at all of these documents. That's nothing more than saying consistent with me is it true. Is it a fraud, is it a lie, is it poppy-cock. Actually he used poppy-cock regarding Doctor Teague, not this document.

That's exactly the question that the Court said you can't do. They are attempting, Your Honor, to back-door this issue. You excluded this witness from the area of youth

marketing. They put a document up because there is a TI

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document about youth marketing. The witness says; "Oh, yes, there is another document."

In this case we saw this document and we can respond to it. Many times he would say; oh, there are many documents that are inconsistent or that proves that this isn't true without identifying. We don't know if he is identifying in-evidence records or not.

But the point is, that's not how the jury decides if something is inconsistent. A witness is not permitted to say to the jury; "this document is inconsistent or consistent; this document is true; this document is false." The jury gets to see the two documents.

If they had a document that they thought contradicted something, they put that in through other means. They don't do it through this witness when he has not been qualified or permitted to testify to that area.

Just because he is someone who knows the evidence, he knows the evidence in this case, 300 documents, but he knows a lot of other evidence that is not in this case. That's the problem.

You could watch this witness. This witness could never answer a question yes or no. Every answer was a speech. There is no way to control this witness launching into -- if you look at the transcripts, my guess is there will never be a

one word answer, no matter how simple. Even a question he answered six months ago "correct" he said "that's a complex question" and he gave a five minute answer. That's the problem.

There's another witness coming that we are going to have the same problem with, I'll just say that right now. We will deal with it at that time.

This is the reason for our initial position. Witnesses just shouldn't be allowed to get up and just run through the documents making comments.

I will close by saying, the bulk of his comments always were essentially "is this true; or is this not true." You said that they can't do that. The rules say that.

I will refer back to the case we cited in our limine motion with this witness. It's a Fifth Circuit case. It says "you can't become an expert just by testifying." That's what is happening here. This expert is becoming a truth-saying expert. There's no such thing. It should not be permitted. Short of a mistrial, there should be some curative instruction with all respect. Thank you.

THE COURT: I don't want further argument, let me rule on this. I don't want any further argument. It just would be protracted.

The old war story of Judge Lee, who I respected greatly, who would listen to one lawyer, listen to the other

lawyer, be convinced and go back to the first lawyer, and that would go on intermittently, a little bit like a ping-pong game back and forth. And it was with his desire to have the correct result that he did that, which is admirable, but at some point it has to stop. I try to limit it to the movant, the respondent and the reply.

I would like to make a couple of brief observations about how this problem hs developed and why it had developed. This problem, it seems to me, has come up because of terminology. Terminology.

Marshal, could you move that thing down. I know Mr. Coll can't see me. He can't see me. The big placards, the

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lawyers can't see around it.
Let me go back now. I have been thinking seriously about this problem as to how the evidence that is presented on both sides can be, as it must, under the rules, be limited to relevant evidence that is admissible under the rules, that is to say that is not hearsay, that is not any of the prohibitive areas that the rules exclude.
When I started into this case -- this will help you understand some of the rulings I am making -- but it was with the concept that a person had to have actual knowledge of something.
In other words, before a person could say, Mr. Bible, from the tobacco companies, took the position that smoking was

not harmful. That person would have had to have heard a speech, or had some personal knowledge of that. He couldn't just come in here and give an opinion about that. Then the predicate would have to be laid when did the witness hear the speech, who was there, what was said.
Very quickly, back in November, you all educated me of the fact -- and let me give credit where it is due, it was Mr. Reilly who startled me one day in one of arguments about those 51 motions that you all made, and we were considering the oral arguments -- and Mr. Reilly said -- I am going to paraphrase, I don't pretend to use the exact words, Mr. Reilly, you said; 'Judge, let me make clear, maybe there is confusion about this -- you were too nice to say, Judge, you are confused -- but we are going to rely on this rule of evidence that talks about ancient documents.
Heretofore, I used to think of ancient documents as the Faeroes. So you went on and elaborated, and you made me realize that one or the other, or both sides, were going to want to get into documents that were in the modern understanding of the rule, quote ancient documents, unquote.
This then caused me to adjust my thinking away from witness who purports what Mr. Bible, CEO at the time to Philip Morris, said to one of realization that witnesses might be going to state; well, it was a position of Philip Morris or R.J. Reynolds or the tobacco institute, A, B, C, and that there

was going to have to be some latitude, only to the extent that it could be established that there was a document that reflected what Mr. Bible said, or did not say on a given point.
From that point I progressed in my thinking to try to analyze this anaphorious body of evidence that is being submitted here.
I told the jury yesterday it is a little bit like smoke, no pun intended. Cutting through to the facts of what people can and cannot say is more difficult in this case, at least for me. You all have been dealing with this so it's not hard for you, but for me -- than it has been in your usual case where people are limited as fact witnesses or expert witnesses to what they personally saw, observed, know, heard, as opposed to what they can give an opinion on concerning what they have read, learned or understood. Experts. I don't mean to make this too wordy. I think it is going to govern, I believe, or it's going to come up at least throughout the trial.
Let me get back to what I said originally. I think that the confusion in my mind -- the problem that I have -- I don't want to say too much confusion, because I think I have answered it, at least to my satisfaction -- has been terminology. The defendants, the tobacco companies, through their lawyers who have studied this matter, obviously, very,

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very carefully, very thoroughly, who had the benefit, all parties had the benefit of apparently a number of other trials

in which depositions were taken, trial transcript was accumulated and established and the parties, and certainly all the companies, through all of this electronic technology, have all of that massive information at their fingerprints through the web sites. Plaintiffs have had it available to them.

So you all have this massive amount of material in what you have represented to me as 32 million documents available to capable lawyers and staff's at their fingerprints with computers. So any witness who testifies in this case, there is some probability that the witness has testified in one, or ten, or fifteen, or twenty other times in other cases. All of that is available to you, and you properly and correctly are using it.

But evolving out of all of that massive amount of testimony on the issue of health and smoking has floated to the surface terminology that you all are using, properly using. This is not criticism. I am just trying to understand where we are in a trial involving issues of whether or not a product was manufactured that was defective in some way that caused injury, in this case, or death to the plaintiff.

And equally important -- I didn't put them in any sequence -- equally important as to whether or not the person, the plaintiff here, who was allegedly harmed by use of that product, did so of his own free choice or whatever decision he made. Whether it that should be imparted the responsibility of

the defendant or not. Those are the basic issues.

Terminology. Now, in all of these other cases, and one time, you, counsel, one side or the other, I believe again it was the defendants told me, and I accepted there are 6,000 cases out there involving health and smoking and alleged injury to people. It may have been the plaintiffs. I am pretty sure it was Mr. Reilly or Mr. Coll. Most of my good information seems to come from Mr. Reilly, Mr. Reid on your side of the case. I believe it was Mr. Reilly talking.

There are a lot of cases either that have been tried or that are out there that would have been filed. With all of that massive amount of litigation ongoing, it seems to me -- and forgive me for being so wordy. I am about to get to the bottom of this -- it seems to me that the lawyers representing the tobacco companies and their capable staffs and law firms, and to some lesser extent certainly lawyers that are in one or two of these cases -- I mean, if one law firm has one case, they may not have developed with sophistication the terminology, parenthesis, legal shorthand, parenthesis, if you lease. But certainly the lawyers representing the tobacco companies have arrived at a legal shorthand or terminology to use in talking about some of these issues that they readily understand and as they were using the terminology, we are all beginning to understand it.

So things are being labeled, i.e., youth marketing,

youth marketing. What does that mean in the context of what is admissible and relevant evidence and what is not?

If you paint with a broad brush a witness who comes in here as a proposed expert and say; well, someone says I want to put him on as an expert in youth marketing, and the other side objects or says here is a problem with his qualifications, or let's have a Daubert hearing, let's do this or that. Or the other side comes up with an expert on youth marketing, if one

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side is able to paint with a brush that expert and label him all over with great yellow paint, he is a youth marketer, then, the argument is made with a certain degree of a certain reasonableness, if he is an expert on youth marketing, he can talk about it. If he is not, he can't talk about it. Then he can't say the words. He can't get into anything, anything dealing youth marketing. And that's a broad expansion of what we are talking about with youth marketing. I am not sure there is such an expert anywhere in the world. I am not sure there is such an expertise.

I readily agree with Mr. Reid's argument that there is something called marketing experts. And Mr. Reid clearly brought that out with questioning about degrees and experience about background in marketing. Mr. Grossman touched on it this morning about what that area would be, what that field would be.

It seems to me within the field of marketing, whether

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it be youth or adult marking, or cigarettes or peaches, a person who had studied, who had gotten degrees in the field of marketing, would be or would not be, depending on his qualifications, labeled an expert. But that person then, when we are talking about marketing, it would seem to me that it would have to do with if he was attempting to opine on how surveys were taken, the procedures for taking a survey, what should go into a survey. If he was testifying about how experts draw and draft advertisements to go in newspapers or television or radio.

If the person was attempting to give an opinion that some advertisement that have of drafted or designed by a marketing expert for cigarette advertising was good in the sense that it would sell cigarettes, or good in the sense that it would actually sell peaches or tomatoes, that person would then be opining, or giving an opinion, regarding the mechanics, of procedures that are utilized by experts in the field of marketing products. That's one thing.

For that, a person would have to have all of this background that Mr. Reid brought out in his cross-examination, all of that examination of where did you go to school and all of that.

The use of language by a person who has been qualified as an expert in document accumulation, document retrieval, document maintenance of thousands or tens of thousands, or

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hundreds of thousands or millions of documents, would not be precluded from using the words "youth marketing" as long as that person did not express an opinion concerning the mechanics of advertising and marketing, selling, that sort of thing.

They just can't separate out of that person's testimony an illusion to marketing entirely when one of the issues being tried by this jury is whether or not -- at least that's one of the issues that you all seem to be suggesting, is a major issue, is whether or not Philip Morris and R.J. Reynolds were attempting to persuade people to buy cigarettes, young people to buy cigarettes. That seems to be an issue.

When the man gets on and he is talking about all of those documents that he has accumulated over many years -- and by the way, maybe you have forgotten, but at one point when he was describing this document accumulation, which I listened to very carefully, because that was one of the areas that he was decreed to have some expertise -- he said that the documents in his facility in New York were in boxes that were stacked -- he didn't make it quite this clear -- what I understood him to say

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there were boxes floor to ceiling that would take up something twice the size of this rather large courtroom. That envisions hundreds of thousands of documents. I don't know how many are there, but, certainly, he is some sort of repository or curator of an incredible number of documents.

Now, he was being asked yesterday, in his direct and

cross-examination, about those documents; what is there; what is in those boxes; what do you have; what have you seen; is this one of the documents. These documents, by the way, that were handed to him have all been carefully gone over with counsel in four days of oral arguments on 736 or more exhibits for the plaintiffs, and we have not even touched on the other over 3,000 exhibits that the defendants have listed as those they may wish to use for the simple reason the defendants are not sure which of those documents they will ultimately want to offer into evidence. We are dealing with thousands of exhibits and thousands of objections to those exhibits.

We have taken care of a portion of those. So we are at a point where how are the plaintiffs going to take those documents presented to the jury in an intelligent way, and ultimately, how are the defendants going to present them in intelligent way to this jury.

Mr. Coll was quite correct yesterday when he said; "Judge, usually your rule is that you don't sit here and read documents to the jury. They can read them." He is right. In your average normal case, the usual criminal case around here is about ten, twelve documents. On a really big case, it might be forty or fifty.

I have never had in these thirty-nine years of presiding over trials in the Southern District of Florida, here and in state circuit court, I have never had a case with up to

32 million documents. This is an unusual case in terms of documents.

Now then, how are you lawyers going to present that to this jury in an intelligent manner, how am I to rule on these matters in such a way that each side has a fair opportunity to present what they believe is important and relevant to the jury.

One way would be to take a document curator, a man who has vast experience in assembling, maintaining, controlling and keeping hundreds of thousands of documents on a given subject, to let that man be declared to be an expert in that field of all of those documents, be on the witness stand, the documents presented to him, and you all were doing this yesterday one by one, show it on the screen, or whatever, and basically asking him, or the thrust is, yes, that's the document that is in the file that he maintains, he keeps and that he is aware of.

Now, then, what can he say about that document? Mr. Coll made this objection several times yesterday. I did not disagree with what Mr. Coll was saying, gee whiz, the jury can look at it. It's up on the screen that must be ten feet high, ten feet across, so why can't they read it.

On the other hand, if we simply let -- and the defendants will have the same problem when they get to that portion of the 3,000 documents listed; what do we do, just put them on the screen and sit here all day long and click the

machine and let them throw up any document that has been admitted into evidence and let them read it?

Or is it more intelligent and a better way of presenting it to have some witness who has either direct

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personal familiarity with the document, that's best. Although these people are dead that wrote these documents. But if you can't have that, is it permissible and proper to bring someone in as a curator of these documents and let that man or woman say; yes, that document is my record. And in as brief a summary as he can give, refer to the document. So if there is something in the record the Appellate Court can look at it.

The Appellate Court can't look at somebody just clicking the Elmo back there. What is it called?

MR. YAFFA: Elmo. E-l-m-o.

THE COURT: It is an electronic device that shines something up on a screen.

The Appellate Court would have no idea if we just sat here and clicked through fifty or one hundred or several hundred documents. So it seemed to me that although it may not be the best way, what we were doing yesterday with Doctor Cummings, and what you were doing in presenting him in that fashion was the best thing. Then have him, I had hoped, refer to the document in a line or two.

Well, this is a letter from the head of the Research and Development Department to the President of R.J. Reynolds

and 1978 and saying -- and then summarizing saying; well, we can all quarrel with his summary. As long as it seems to be a some what fair summary of what is in the document, it seems to me that that is the best way to present it to the jury. I think that is what Doctor Cummings, by and large, was doing.

To that extent, his expertise in the field of these documents -- and you all have emphasized today that it was TIRC and CTR, acronyms for Tobacco Industry Committee or whatever, and yes, it is true that there are other documents that he is talking about that did not come from the files of the Tobacco Institute. But on balance, in trying to handle them and manage a case involving these hundreds of thousands of exhibits, it seemed to be a proper and fair way to do it.

The defendants will, of course, be able to bring a similar witness or even a better witness. They may even have the author of some of these documents that can testify. If the defendant's meaning, or interpretation, summary of those documents is different. They will have the same latitude to have somebody talk about a document that he or she did not personally like, did not personally receive, but has been retrieved from the archives of this 32 million document web site.

It seems to me that that is about the only way this type of evidence can be presented. Now, then, therefore, we get back to terminology. If we label it and say somebody can't

talk about youth marketing, unless they have a degree in marketing, or somebody can't talk about the O-ring on the original endeavor vehicle that had a lead and tragically that crashed sixteen years ago, unless he has a degree in engineering and in O-rings and all of that, would be to preclude a mechanic who installs an O-ring that maybe does not have a degree in anything from saying I saw the fisher in an O-ring.

By labeling subject matters, when you get this finite with youth marketing or -- in some general expertise field; maintenance of documents, that's an expertise that I never have run into. I don't think a person would have to have a degree in library science in order to talk about maintaining documents if a persons life work was to maintain documents in a certain field.

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If the person was trying to talk about the Dewey Decimal system in numbering books in a library, no, they can't do that. It's got to be certain latitude, and that's what I have been endeavoring to do. I think terminology is a big problem, and I think it is getting clarified in my mind.

Now, if we look at the question of whether or not he can express opinions as to what would appeal to a young person thinking of buying a product, a cigarette, peaches, tomatoes, a car, whatever it is, it seems to me that Doctor Cummings, by virtue of his years of experience in dealing with these 10,000

persons in this cessation of smoking, has an expertise sufficient that would enable him to express an opinion about whether young people, or old people, or whatever would or would not have been persuaded by an ad or some advertisement.

Not the mechanics of some ad got placed in the public stream of consciousness, not how with the experts that sat down that said should we have a picture of John Wayne on the cover or a picture of Joe Jones, a taxi driver in Brooklyn that nobody ever heard of, not that. But whether or not that would be something that would cause a person to stop smoking or smoke from reading that ad, I think he has that degree of expertise to be able to express that opinion.

Can he or should he be able to express things like "that is a lie," "that is a fraud," "that is a poppy-cock." No he should not have the ability to say that. I will instruct the jury to disregard that. I will again remind you, again remind you that Court's generally not self-starters. We react to motions that are made and requests that are made by counsel.

So, if you want me to instruct the jury about something, to disregard something or to strike, you have to move for it. You know how to do this. No one asked me to instruct the jury about this.

Perhaps I should have stepped in and done some on my own. I will be more careful about that. I will watch that in future witnesses. I probably will inject myself in it. If I

don't you've got to ask me to do these things if you feel it's appropriate.

I will, at this time, instruct this jury that so far as Doctor Cummings expressed those types of opinions in those words, they should disregard it, that is for them to decide.

I don't believe it is appropriate me to limit the labeling of experts into such fields that they cannot talk about youth marketing at all. That's a big issue.

Lastly, and then I am done, is the question of whether or not there is a strong position by the counsel for the defendants, whether or not it is necessary for the plaintiffs to prove that the deceased, Mr. Allen, actually read, actually saw, personally saw, the advertising that the defendant companies did about their product.

The plaintiffs are not required to prove. That would be desirable. That would be good for them if they could do that. But both sides have the ability to prove circumstantially certain things happen, circumstantially certain things happen.

For example, if the defendants could prove that -- forget Mr. Allen. In a given case, if a plaintiff were able to prove that there was a billboard directly across the street, the street in which a person lived that allegedly was injured by something being advertised on the billboard, if there was a billboard there and the person lived in the house for fifteen

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years and had to walk past that street corner once or twice a day for fifteen years, but they could not prove that the person ever read billboard. They would have the right to prove that the billboard existed and what it said; if it was relevant to cigarette smoking or peaches or whatever. Then they could argue to the jury that while they can't prove that he ever read that, that circumstantially, chances are he probably did, or the jury can reasonably assume that circumstantially that he did, that would be circumstantial evidence which either side could put on.

The other side could have argued; wait a minute, there's no proof that he ever saw the billboard. We can prove that he never went down that corner. That's argument for the jury. The jury can except the circumstantial evidence or not accept it as they see fit. I took an extreme example because I don't suggest there is any evidence about a billboard across the street from Mr. Allen's house. I don't mean to imply that.

I am saying an example of circumstantial evidence, it is not necessary that someone have direct, or be able to prove direct absolute positive knowledge of a fact. They can do it, if they can -- maybe they can't even do it circumstantially, but they have got the right to try. That's what we are dealing with there.

So insofar as this constitute the rejection of the proposition advanced by the defendant that there must be

positive direct proof of knowledge of the advertising, I think that is put to rest with this ruling.

With respect to the terminology, I made by best explanation that I can make to attempt to help you understand what I have been doing as I read through these hundreds of pages of depositions. I have tried to formulate some principal that will guide me in making a fair decision on these matters.

The way I have been describing it will be applied both ways. When we get to the defense side of the case, they are going to have the same type of application of the rules as I've announced that I am interpreting.

That is the best I can do with this. The motion for mistrial is denied. The jury will be instructed to disregard opinions expressed by the witness as to the truthfulness of a particular document or not.

The rest of his testimony that -- I am trying to think of an example where somebody said a tobacco executive said we are not advertising for -- I guess the example is we are not advertising with the idea in mind of trying to get young people to smoke, and that he was asked questions about other evidence which would indicate to the contrary. That's all proper evidence, his opinion about the truthfulness and things like that, although are understandable, given his strong bias and prejudice against the tobacco companies is understandable, but should not have been expressed. To that extent, it is granted

in a very small part. Denied in a large part. We will bring the jury at this point. I will advise them.

MR. REID: This is the deposition of Mr. Schindler all marked up for the Court that I promised you, and marked for you, and a copy of our objections.

THE COURT: Thank you. Gentlemen, I am going to have to excuse myself like ten minutes ago to go to that event this morning.

We are going follow that procedure of question and answer that we talked about yesterday; is that correct, gentlemen?

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MR. REID: Yes, sir. Bring the jury in.

[The jury returns to the courtroom].

THE COURT: Ladies and gentlemen, be seated please. Please accept my apologies for being late this morning.

Let me give you the following instruction. We have been listening yesterday to the testimony of Doctor Cummings, as you know. And Doctor Cummings was delineated as an expert in two fields. One was smoking cessation, stopping smoking. Another one was in CTR and TIRC documents, documents from the be Tobacco Institute Research Committee. I don't know how many there are. I think maybe 1,000. I think he said for the last twenty-two years he was keeping the documents, storing them and all of that. We felt he was qualified to be an expert to identify the documents that came from those, and in referring

to the documents, summarize them briefly. You all read those that were presented here and he summarized, or attempted to have summarized. Sometimes you may not have agreed with his summary. You may have thought that he didn't summarize it right or maybe, yeah, he did summarize it accurately. That's up to you. And he was entitled to express certain opinions because I had declared him to be an expert.

Now, one thing that the Court is now going to tell you to disregard in his testimony is the following. At times he said something to the affect "that's a lie" or that's "poppy-cock" or "that's absurd." Those were his personal opinions, and I should have told you to disregard that because you folks decide whether something is a lie, whether something is poppy-cock or whether something is fraud. So disregard those sentences when he would, every now and then, inject that into his testimony.

The rest of his testimony, like any other expert, you can accept it. You can believe it. You can reject it or disbelieve it. That's entirely up to you. That is an instruction that I give you with respect to that.

The last thing I will tell you this morning is I am going to have to ask you to excuse me until after lunch.

This has nothing to do with a trial. A very dear friend over thirty years duration, he and his wife, has made an extremely generous contribution to the University of Miami

medical facility. It has nothing to do with this case, nothing to do with this case. This is a former United States Ambassador, and he has made a very substantial contribution to the University of Miami, pediatric medical facility out here at Jackson Memorial Hospital, and they are honoring him with a little luncheon for he and his wife. My wife and I have been friends for thirty years. He has a very small family. We are like family. He has asked me to come. And I told him I couldn't because we had this trial. I told his secretary I couldn't.

The next thing I know the doctor in charge of the program calls me. Next thing I know Ms. Kramerman is giving me a fit because it is important to the community. I have changed my mind. I am going to go. I explained all of this to the lawyers and they understand.

So that you all are not just left with nothing to do but to keep the trial going on in a good continuity, they are going to read to you depositions. Depositions are direct and cross-examination of witnesses or trial transcript taken in another case. The witness is testifying in these instances under oath and subject to cross-examination, and they are being read to you as though the witness were here in person.

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The first one deals with Mr. Bible. He was, at the time that he gave the testimony, the CEO or President -- does anybody know? Chief executive officer of Philip Morris. He

gave certain sworn testimony in a trial.

One of the lawyers, Mr. Grossman, is going to sit in the witness stand, and you should imagine that he is Mr. Bible, CEO of Philip Morris at the time, answering questions asked to him by Mr. Cohen. They are going to read from this document question and answer. Question and answer.

This testimony is like any other testimony. It has no greater weight that it is written down or has no less weight. You would consider it and treat it like you would any other witness who is testifying here. We are doing it this way. I am making this lengthy explanation because there will be more depositions as we go along, more transcript that they will read to you.

In each instance you pretend that whoever is reading it is the person involved. You have to pretend that in your mind. Treat it like you would any other witness. Believe it if you think it is believable. Do not believe it if you think it is not believable.

Oh, you have a picture there. It looks a little bit like Mr. Grossman, doesn't it?

Ladies and gentlemen, I have read the transcript myself. I had to rule on it myself with certain legal problems connected with it. Don't think that I am making you do something that I didn't do too. I read it before at night. They give me one of these things every day. That's not their

fault. It's just of the way it works.

I am going to excuse myself. There will be no comments or talking. It's just the reading of question and answer. It is now, whoops, it is five minutes to ten. I have got five minutes to get across town. At some point, at whatever time is convenient, I would suggest maybe in about an hour, the lawyers will agree that you all take a short recess and then go through to 12:00, 12:15 and then recess. I will resume with you, let me say, quarter to 2, 1:45. Whenever you go to lunch, you will come back at quarter to two. Now, remember the instructions when you go out to lunch about not discussing the case.

We thank you very much.

Mr. Reilly?

MR. REILLY: Your Honor, I don't think you gave us the rulings on volume three yet.

THE COURT: On what?

MR. REILLY: Volume three.

THE COURT: No, I did not. I am sorry. I didn't get it. So I think the first two volumes should take you up to noon. I think. If it does not, I'm sorry.

MR. REILLY: No problem.

THE COURT: I did not. I worked on it this morning. I didn't finish it. I haven't been able to get Ms. Kramerman to type it up just yet.

Ladies and gentlemen, thank you for your understanding.

[The Court exits the courtroom.]

MR. GROSSMAN: Ladies and gentlemen, this is a transcript from the testimony of Geoffrey Bible taken in a following proceeding in Minnesota, the State of Minnesota by Huber Humphrey III, it's Attorney General, Blue Cross Blue

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Shield of Minnesota, plaintiffs versus Philip Morris Incorporated, Reynolds Tobacco Company, Brown and Williamson Tobacco Corporation, BAT Industries PLC, Lorillard Tobacco Company, The American Tobacco Company, Ligget Group Inc., the Counsel for Tobacco Research USA Inc., and the Tobacco Institute defendants.

This testimony was taken on March 2, 1998. I will be playing the part of Geoffrey Bible.

GEOFFREY BIBLE, PLAINTIFF'S WITNESS

DIRECT EXAMINATION

MR. COHEN: Beginning on page 15, line 23.

[Transcript GEOFFREY BIBLE was read]

DESIGNATIONS:

MR. COHEN: Page 16, line 15 through 24.

MR. COHEN: Page 17, lines 23 through 25.

Page 18, lines 1 through 8.

Page 25, lines 4 through 10.

Page 33 lines 9 through 25.

Page 34 lines 1 through 25.

Page 35 lines 1 through 25.

page 36, lines 1 through 25.

Page 37 line 1 through 5.

Page 38, lines 9 the through 25.

Page 39, lines 1 through 7.

Page 40, lines 12 through 25,

Page 40, lines 12 through 25.

Page 41, lines 1 through 25.

Page 42, lines 1 through 25.

Page 43, lines 1 through 25.

Page 44, lines 1 through 25.

Page 45, lines 1 through 6.

Page 47, lines 4 through 25.

Page 48, lines 1 through 19.

MR. GROSSMAN: We read page lines 1 through 25. What page are we on now, Mr. Cohen?

MR. COHEN: 54.

Page 64, lines 20 through 25.

Page 65, line 1 through 3.

Go to Page 67, line 1 through 15.

MR. GROSSMAN: Page 2 through 15.

MR. COHEN: I am sorry. 2 through 15.

Page 68, lines 6 through 25.

Page 69, lines 1 through 13.

Page 76, lines 13 through 25.

Page 77, lines 1 through 13 and 22 through 25.

Next Page 78, lines 1 through 25.

Page 86, lines 15 through 23.

Page 78, lines 5 through 9.

Page 91, lines 2 through 22.

Page 92, lines 5 through 9, and 16 through 24.

Page 93, lines 4 through 10.

Page 94, lines 2 through 11 and 21 through 25.

Page 95, lines 1 through 25.

MR. GROSSMAN: Quoting.

MR. COHEN: Page 96, line 1 through 22.

Page 99, lines 21 through 25.

Page 100, lines 1 through 17.

Page 101, lines 5 through 25.

That was Page 102, lines 1 through 25.

Go to Page 110, lines 3 through 25.

Page 111, lines 1 through 25.

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Page 112, lines 1 through 9.
Page 114, lines 6 through 15.
Page 116, lines 16 through 23.
Page 117, lines 1 through 8.
Page 118, lines 7 through 25.
That was Page 119, lines 1 through 25.
Page 120, lines 1 through 15.

Turn to Page 121, lines 16 through 25.
Page 122, lines 12 through 25.
Page 123, lines 1 through 25.
Page 124, lines 1 through 8.
Page 125, lines 4 through 21.
Page 126, lines 4 through 25.
That was Page 127, lines 1 through 25.
That was Page 128, lines 1 through 16 and 24.
Now go to Page 140, lines 3 through 23.
Page 141, lines 4 through 19.
Page 146, lines 1 through 25.
Page 147, lines 1 through 25.
Page 148, lines 19 the through 25.
Page 149, lines 1 through 4 and 19 through 25.
Page 152, lines 11 through 25.

MR. GROSSMAN: That is the end of volume one. We'll take a ten minute recess until 11:00 before we read the next volume.

[The jury leaves the courtroom].

[There was a short recess].

[11:00]

MR. COHEN: We have been advised that one of the jurors has taken ill. 911 has been called by the Judge's staff. This all occurred during a morning break. We believe the best thing to do is wait until the Judge returns at 1:45

for further directions and rulings with respect to this.

On behalf of the plaintiffs, and I think with agreement of the defendants, we are going to break now and return at 1:45, and the Judge's staff will inform the balance of the jurors that they are to return at 1:45 as per our understanding.

MR. REID: Yes.

[There was a recess].

THE COURT: First, before we take up the business at hand, let me say that I appreciate the lawyers' indulgence in helping me arrange the unusual step of being absent and while are you were able to go forward with the reading of depositions.

Just as a matter of interest only, nothing to do with the trial, but I learned that the spread of AIDs and related communicable diseases pose one of the major threats to people worldwide. I learned further that Miami, Florida has the highest concentration of it of any metropolitan area in the United States. This hospital is presently treating 300 innocent little children that have AIDs.

This is a communicable disease. This is not inherited, you understand. This was honoring Ambassador Green. He and his wife had given 2 and a half million dollars to help the clinic and treatment of people and in conjunction with taking medical treatment to Haiti. Haiti has the largest

concentration of AIDs of any country in the western hemisphere. It's a critical, critical problem, and these doctors are doing wonderful things.

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Now turning to what has occurred in the last few hours. Although something has happened in the last half hour that you may or may not know about. I am handing it out to you know. The U.S. marshals have made an incident report regarding juror number one, Mr. Levy.

As you all know, and again, you probably know more about this than I do, but at be approximately 11:05 juror number one, Mr. Levy, complained of numbness in his right side and right arm, I guess. You have the incident report. You can read it. The marshals called 911. The medics arrived and treated him and did certain tests. Took his pulse, did other things.

They apparently arrived at 11:36, according to the incident report, which I will make as Court's exhibit in the record, they determined he did not need hospital treatment at this time and advised a rescue personnel to contact his physician.

Apparently, all of that happened some time between the time of 11:05 and then when 911 arrived at 11:38. They took a blood test, Ms. Kramerman advised me. Did some other things on the spot. I don't know how long that took. Then he wanted to be released. Signed releases to 911. He wanted to go out to

lunch. Went. Left. I will let Ms. Kramerman tell you, in her own words, what has happened since then.

COURTROOM DEPUTY: During the lunch hour, the court reporter Robin and I had gone to McDonalds, and we ran into four of the male jurors who advised me that juror number one Mario Levy had another attack while they were at Bayside. This time a little more severe. They called the paramedics and his blood pressure was sky high. They transported him Cedars Hospital, and I haven't heard other than that what happened.

THE COURT: They transported him to the hospital?

COURTROOM DEPUTY: Yes, to Cedars.

THE COURT: That's all I know. The other jurors have returned, Marshal?

MARSHAL: Yes, they have, Your Honor.

THE COURT: And they are in the jury room.

Do any of you have any comments, or any motions, or any position, any statements? Do you want me to be a self-starter? Mr. Reid is smiling over there, not smiling, but sadness, about me looking at him in what to say.

MR. REILLY: I guess the issue is whether or not there is any reason to reasonably expect that Mr. Levy would be returning or whether or not we should proceed on with seven jurors rather than eight. Since I don't know anything about his medical condition, I don't know what a reasonable expectation would be under the circumstances.

THE COURT: That is certainly reasonable. I suppose the first thing to do is for the Court to ascertain his condition and report that to counsel. I suppose that to accomplish that, I suppose that the best way might be to ask the deputy, U.S. Marshal Christina Fernandez == or maybe she is marshal now, I am not sure, anyway, a very experienced U.S. Marshal. I think that probably I should ask her to contact Mr. Levy's family. We can give them what information we have from the jury questionnaire about his address and phone number and that sort of thing, and have the U.S. Marshal report back to us what they learn or she learns. I do not know how long that will take.

I presume his family has been notified. I would hate to be the bearer of bad news, but they need to know anyway. I

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suppose that is the first step. Once we know his medical condition, they can decide what to do. I take it we should at least await the information we will gain from this first step before we consider other alternatives.

MR. GROSSMAN: Judge King, I think it's safe to say he won't be back today. So I really think it's up to you. We have an expert here that we brought in this afternoon. In the normal flow of things, we thought we would have concluded Bible. I would at least like to know, and you tell us exactly what it is and we will do it. Do you want me to then send him home, if we're going to continue on?

One of two things, if he is a real extremist, the way emergencies work, is that you hope he will be seen and admitted. To that circumstance, he won't come back.

If he is not, then he has got to wait with 75 or 85 other people as they plow through the triage system to get to him, and that's not going to be before 5:00. That's my own knowledge of the way things are.

THE COURT: I am sure you are right.

MR. GROSSMAN: I think we are faced with one of two choices really. If you tell us to proceed, we will call our expert with this jury. If you tell us take the day off, we will take the day off.

THE COURT: Normally, normally I would take the first step that Mr. Reilly suggested. Normally, I would attempt to take as much as information I would do. Doing it promptly and not talking about waiting a week, or a few days, or whatever before we decided or confronted the problem with whether to go on without him permanently.

Maybe this is fortunate, and maybe it's not, but this is a Friday afternoon, so it may well be that he would be able to come back on Monday and the jury would go right ahead. All the other jurors know what has happened. They saw it happen.

I only mentioned that because of the nature of this case. So there are other factors that, were I seated, where you all were seated, I would have a concern about it, and I am

sure you do, you lawyers do about what should or should not have happened at this point, even if we assume that he could come back Monday. That's a different problem. Maybe I think too deeply about these things.

On the surface of it, normally I would attempt to find out immediately. If they released him and he is on his way back to the courthouse, obviously, we would go ahead. That happened to him once. I would think he should not.

By the way, this is totally incidental and coincidental, but there were three doctors seated at the table when I came back from speaking with Mrs. Kramerman and I learned of this incident, and I mentioned this incident, and the three doctors started talking immediately about what should be done for him. This is before I knew about the second incident. So all of a sudden I am getting overwhelmed with medical opinion. I said I am not there. 911 is with him. He should get immediate care.

We used to tell people that sounded like stroke, we will wait three or four days. Now we don't do that. We do this or we do that. The doctor to my left says, yes, but 911 can do that. The other two doctors said, yes, but what if they -- they had a big discussion, and I don't know that it helped any of us, and I thought what did I get into here.

Well, Vicki, can you work with Christina, who is very experienced and tactful and diplomatic, give him the man's

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information and try to talk to his doctor, and try to find out what the expectations are for him to come back. Vicki, let me ask you, maybe if you would please, to go get that. Maybe have Christina come over here and the two of you talk to his wife or let her do it. She will know what to do.

What we really want is to know from his Doctor, if possible, but somebody with some degree of authority, if he could come back and if so when. They will do that. That's what we need to know.

Now, in the meantime, I would guess that probably we should excuse the jury for the balance of the day and have him come back Monday. We would cross the bridge Monday as to what you all move for or ask me to do, ask me to rule on, based on whatever information. Then, plus, anything else that occurs to you. I don't think that there's any need to keep witnesses waiting or lawyers waiting. I need to be able to get in touch with you, which I can, of course and my staff will give you whatever information I have. I suppose that's where we are at this point, and we will cross those other bridges later. That's a suggestion.

MR. GROSSMAN: May I ask you a question, Judge? Do any of us have a right to say we are not going to go with seven jurors? It's my understanding that it's really your decision.

THE COURT: No, you make your motions. I rule on them, and that's what we do, like everything else. No one has

a right to insist that we not go forward, as long as we have more than six. We have to have six. But beyond that, if somebody obviously cannot be back, then that person is excused and we go forward. If they can come back, since you all went -- since all of us went into such excruciating thoroughness about selecting this jury, I have to believe that the lawyers on both sides feel they have got a very good jury to listen to this case.

You may have a difference about one juror than the other. But this is my perception, that you all feel we have got an excellent jury. I have noticed the attentiveness about the plethora of statistical data. I think we have a very good jury. Therefore, I would assume that you would like to keep it intact. That's just my perception. We would like to keep it with the eight and go forward. If one can't come back, then we do it with seven, and life goes on.

We ought to make this limited effort to go forward with what we've got, limited being at least an hour or so to find out what the medical condition is and the prognosis is.

In my experience with these things, the doctors don't always give you a prognosis right away. They are reluctant to tell you; yes, Judge, he can come back and sit there eight hours a day for the next three weeks and that will be fine. They don't want to say that. We will get out of them what we can get out of them.

In the meantime, we will take the initial step of investigating it. Basically, Mr. Reilly was speaking for all of us. We ought to do that. That will take us a few hours. It is Friday afternoon. Whether we want to keep the jury here against the possibility that the prognosis be that, no, he can't back under any circumstances, and say come on in the seven of you and we go forward, or whether we want to take this point in time, now it's 2:00, to say let's be considerate of the witnesses and my staff and let them go home for the afternoon, and we all will resume at 8:30 Monday morning and

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evaluate the situation, and it's going to be governed by whether he can come back.

If they say well, he is going to need ten days rest, then my ruling in all probability will be -- here I go giving you anticipatory rulings, but I think sensibly and logically we would say; I am sorry Mr. Levy, hope you get better, and we will go on with what we have got.

MR. GROSSMAN: The plaintiffs would like to make that motion only because we have got an expert flying in Sunday, Judge.

The only motion I would make is that we begin the trial with as many jurors as we can Monday morning so we can fly our expert in this weekend and meet with him and not be faced with anything else. I think we should all agree with that so we know where we stand.

MR. REILLY: We do agree, Your Honor. I think in consideration of the staff, and the witnesses, and everybody else, including Your Honor to be honest with you --

THE COURT: Oh, I can read all of that paperwork you gave me now. Now I have got forty-eight hours instead of two hours. I am joking. But if you all feel that way, fine. We can say we will start Monday morning with or without Mr. Levy, and that's fine.

I was attempting simply to keep the eight people there that you all had so carefully selected, if we can do that, because that's what I do in every case. The criminal cases, maybe it's of greater urgency. That seems to be what the lawyers like for me to do in criminal cases. They like to keep the same jurors if they can.

If you can agree that we will start Monday morning at 9:00 with or without Mr. Levy, we hope with him, but without then so be it. I will still endeavor to get the medical information.

Of course, you will see him. Monday morning he will show up or he won't. That's very simple whether we get any medical information or not. It can not hurt for the marshals to make inquiry. It would be a kind thing for us to let his family know that we, at least, we are all concerned about him and want to know that he is all right.

I take it then, that it is the thrust of the

plaintiff's motion that irrespective of these circumstances, the plaintiffs wish to go forward. I have not heard from the defense, but is that your position?

MR. REILLY: Sure, Your Honor. Whatever the configuration turns out to be on Monday, I am sure we would want to go forward.

Your Honor, I think you anticipated, or maybe were doing some thinking for us, about whether or not we might want to inquire of the jury on Monday. If no one is affected by this, and they still want to go on with hearing the evidence and deliberate in the case. Whether we ask Your Honor to make such an inquiry next Monday, I think we will have time over the weekend to think about it. We may come back and say let's just go forward. Mr. Levy may be back with us, and we will go forward as is. I think by giving us this extra time, it will give everybody the opportunity to be thoughtful about what happens come Monday morning at 8:30 or whatever time Your Honor designates.

THE COURT: Yes, but we are making a decision right now to go forward Monday morning?

MR. REILLY: Yes, and we are all in agreement with

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that.
THE COURT: I told you that I think too deeply about these things. I don't want to have to deal with Monday morning having told everybody, go get ready for Monday morning.

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Let me be blunt with you. Let me be blunt with you and tell you what is of concern to me. A forty-five year old man, one juror, who has smoked a certain portion of his life, and as far as I remember from his questionnaire, still does, still smokes, has had an episode here today that may be a stroke.
He has listened to four days of testimony from experts, people that are familiar with this problem, and whether this has had some psychological feeling on his situation or, indeed he has had some sort of minor problem or a stroke, those facts are known to the other jurors.
I don't mean to create problems. If you are satisfied with that, that's fine with me. But there is a problem that I don't want to have to deal with on Monday morning. We have made a good decision that is we are going to go forward one way or the other with or without Mr. Levy. Fine.
I don't mind inquiring on Monday in a general and bland way of the jurors if any of them have any difficulty with going forward, and I am sure they probably are going to say yes, they can go forward. I am guessing. I don't want to then have a problem that maybe we should have considered this other matter of any psychological effect it may have had on the other seven jurors to witness somebody having what appears to have been a stroke. That's what I had in mind when I said you ought to give some thought to this incident this afternoon, given the

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type of case this is.
If this was my typical case I finished a couple months ago, where five cops beat up -- excuse me, five cops were charged with beating a fellow, then I wouldn't have brought this up. Given the fact there's a lot of medical testimony and a lot of medical problems here, smoking -- and I shouldn't have brought it up anyway. Let's cross that bridge up. Let's not let Mr. Cohen, or Mr. Grossman, or somebody working a whole weekend working with their experts, and you all working to give me more of these voluminous things and all of that. Let's cross that bridge.
MR. REILLY: Judge, as far as going forward with the seven jurors, I don't see a problem with that although we may ask you on Monday to make a bland inquiry of that. However, if Mr. Levy were to come back on Monday -- I would like to talk to my client about that.
THE COURT: You can make any motion you want to on that. If you want to move to excuse him, you can. I didn't mean to interrupt you. We can handle that. Wherever that comes out, it comes out.
My worry was the jurors seeing this man being treated by 911, if they did. You know my concern. That is not a concern for the defense. If it is of no concern to the plaintiffs -- you have to speak out loud for Robin to write it down -- you don't see that as a problem?

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MR. REID: I'm sorry. Your Honor, I was going to say I think the best course is to wait to find out exactly what he had, what happened to him. If he had a muscle spasm from sitting all morning, we can't really comment until we now more about the medical condition.
THE COURT: Mr. Reid, if he had a toenail hanging that

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was hurting, and they all saw 911 rush in, it is the same thing. It doesn't matter what his medical condition is. If he shows up, and you wish to move to exclude him, or they agree or do not agree, we can deal with that. What I am worried about is the other jurors knowing that he had this numbness in his left side and all of that.

The defendants are comfortable with it. Is the plaintiff satisfied and comfortable with it? If so, what is your position?

MR. GROSSMAN: Judge, we would just like to begin again on Monday morning so we don't go through the expense of preparation.

Now, if in your opinion -- because I presume we are all going to be leaving, at some point I know the marshal can contact you at any time. If you determine that some condition of his prevents him from coming back Monday, or you think it's a bad idea on your own, just please excuse him so he doesn't come back to the panel.

THE COURT: Yes, the marshals will tell me. I either

will talk to the doctor or the marshals will. Whatever his doctors say is going to control his future on that. I am not going to insist that Mr. Levy comes back here on Monday morning just to report that he is going to undergo therapy for the next six months, we are not going to do that.

MR. GROSSMAN: What you have done by thinking through this thing beyond what others have done has now caused me to start thinking. I see a little scurrying over here, so let me tell you exactly how I feel. I don't want this to result in a motion for mistrial. If you were to bring in the remaining jurors and tell them; "are you okay to proceed on Monday? Mr. Levy may or may not be here." That would be very much appreciated. I think it would be a good idea for no one to communicate, from the jury, with Mr. Levy. He maybe gave somebody a phone number; you know, let me know how you are doing over the weekend; something like that.

THE COURT: I will tell them not to have contact. That would be routine.

MR. GROSSMAN: Then if Mr. Levy comes back on Monday, maybe the marshal could have him come to see you separately.

THE COURT: We will have talked to somebody in medical authority by then. The marshal should learn. They will go out and talk to the doctor.

We will excuse the jury at this time with the admonition of not talking to anybody. I will endeavor to find

out what the medical condition is. We will resume Monday morning with a jury proposed to be all eight with Mr. Levy here, or seven without Mr. Levy. If Mr. Levy shows up ready to go to work, you still would have the opportunity to move to excuse him or take him off the jury, make any motion you want to about that, then I will rule on it depending on where we are. We all understand where we are.

Bring in the jury.

[The jury returns to the courtroom].

THE COURT: We don't have any information from Mr. Levy except to tell you that he is getting medical care. Everything is being done for him. I don't know. I can't tell you more. You know as much as I know or we know.

Under the circumstances, we have agreed that you should be excused until Monday morning. We will ask that you return a few minutes before 9:00 on Monday morning.

Again, please, follow my instructions that I have

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given you every day which is do not talk to anybody about the facts of the days. Do not permit anyone to talk to you about the case. If there should be something in the radio, newspaper, T.V. don't read it, watch it or listen to it.

Those of you who may have exchanged phone numbers with each other, probably unlikely, but you may have, but if any of you have any ability to contact Mr. Levy or his family, we ask that you not do that.

Through my marshal service and Ms. Kramerman will be in contact with his family, and we will wish him best wishes from all of you and all of us. He probably will be right here Monday morning. We don't know that yet though. Please don't have any contact with Mr. Levy. It's a very human thing to do.

We will go forward Monday morning with trial, and depending on how Mr. Levy feels, what his doctor says, he may be, and probably will be right there as juror number one. If not, we will go forward with the seven of you folks.

Now you know everything that we know. I think that is all we can tell you at this time except to thank you again for your patience.

A JUROR: Your Honor, I gave Mario my home phone number.

THE COURT: Come right up here. I can't quite hear you.

[Juror approaches bench.]

THE COURT: Juror number three advised me, being a decent human being and concerned, gave Mr. Levy his home phone number and asked Mr. Levy to call him. He has shared Mr. Levy's home phone number with the jurors. So it shows you that we have good people on the jury that are concerned about each other, and that's good.

I would ask you not to call him, but if he calls you and tells you how he feels, and talks to you about his health,

I think that's fine. That is human. You can tell him that we excused you for the afternoon. We hope he is feeling well, and that's just what happened.

Any objection to that if it occurs? Any objection to that?

MR. REILLY: No objection, Your Honor.

THE COURT: We thank you for bringing that to our attention.

Marshal, if you will see that they get to the elevator.

We will see you folks a few minutes before 9:00 on Monday morning.

[The jury exits the courtroom].

THE COURT: Could somebody let me know how far you all got or where we are going to be Monday morning. That's all I need to know.

Mr. Yaffa?

MR. YAFFA: Judge, in terms of the readings today, we almost got finished with volume one of Geoffrey Bible's deposition. We did not yet finish that.

However, because we have commitments with live witnesses, experts that have arranged their schedules and they will be flying in, we will be starting Monday morning, hopefully, with Doctor Neil Benowitz from California.

Monday afternoon will be followed by Doctor Finegold,

a pulmonologist from Miami.

THE COURT: So what you would like to do is to recess

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that reading of Mr. Bible's sworn testimony to the jury, and take up live witnesses?

MR. YAFFA: Yes, sir.

THE COURT: Anybody have any objection to that temporary interruption?

MR. REILLY: No, Your Honor.

THE COURT: We will start with the live witness on Monday morning.

We have the deposition of Mr. Paul Mele. We would like to give that to you. It is color-coded as the other ones.

THE COURT: Thank you. Monday morning.

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____

DATE

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